

UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE PATENT TRIAL AND APPEAL BOARD

VF OUTDOOR, LLC,
Petitioner,

v.

COCONA, INC.,
Patent Owner.

Patent No. 8,945,287
Inter Partes Review No. 2018-00190

PATENT OWNER'S SUR-REPLY TO PETITIONER'S REPLY

I. Introduction

The Board should affirm the patentability of claims 27, 28, 30, 32, 33, and 35-39 (the “Challenged Claims”) of U.S. Patent No. 8,945,287 (the “Patent”) for at least the reason that Petitioner VF Outdoor, LLC (“Petitioner”) has not met its burden of proving unpatentability by a preponderance of the evidence in view of the claim construction arguments and evidence presented in connection with the Petition (Paper 1) or in connection with Petitioner’s Reply (Paper 33).

The Board should also disregard the substantial number of new arguments and related evidence presented by Petitioner in connection with its Reply. Petitioner’s Reply improperly relies on new evidence and new arguments that were not raised in the Petition. On that basis, Patent Owner requests that the Board disregard Petitioner’s Reply and all untimely, new evidence filed by Petitioner. *See Twitter, Inc. v. Vidstream LLC*, IPR2017-01131 (PTAB Jan. 23, 2019) (Paper 71, p. 8), citing *Intelligent Bio-Sys., Inc. v. Illumina Ltd.*, 821 F.3d 1359, 1369 (Fed. Cir. 2016) (“Once the Board identifies new issues presented for the first time in reply, neither this court nor the Board must parse the reply brief to determine which, if any, parts of that brief are responsive and which are improper”). “It is of the utmost importance that petitioners in the IPR proceedings adhere to the requirement that the initial petition identify ‘with particularity’ the ‘evidence that supports the grounds for the challenge to each claim.’ 35 U.S.C. § 312(a)(3).” *Intelligent Bio-Sys., Inc.*, at 1369.

Law on this point is clear and unambiguous—Petitioner’s untimely, new arguments and evidence must be rejected and disregarded. *See Aisin Seiki Co., Ltd. v. Intellectual Ventures II LLC*, IPR2017-01538 (PTAB Dec. 12, 2018) (Paper 7, p. 59-60) (Rejecting Petitioner’s new, untimely arguments and explaining, “Petitioner’s arguments in the Reply are untimely and do not remedy Petitioner’s failure to develop its unpatentability contentions in the Petition”).

II. Claim Construction

A. “Active Particles”

The Reply advances a new claim construction argument for “active particles,” namely that “active particles” need only “impart various enhancing properties to membranes.” Reply at 2. This is problematic for a number of reasons. First, it is improperly presented in the first instance on Reply. *See* Revised Trial Practice Guide (“RTPG”) 2018, p. 14 (“Petitioner may not submit new evidence or argument in reply that it could have presented earlier, e.g. to make out a prima facie case of unpatentability”); *Intelligent Bio-Sys., Inc.*, at 1369. Neither the construction advanced in the Petition (Paper 1) nor provisionally adopted by the Board (Paper 14) encompass any particle that just adds properties to a membrane. Petitioner’s new construction is so overbroad that it does not even require a reaction of any kind—only that the particle “enhance” the “properties” of the membrane. Petitioner does not tell us what the “properties” are or how to determine whether a property is

“enhanced” as opposed to degraded. Is color a “property” and if so, how is it “enhanced”? Petitioner does not say. Is density a “property,” and if so, how is it “enhanced”? Petitioner does not say. The net result of Petitioner’s proposed construction is that any particle added to a membrane, even an inert filler changing the density or color of the membrane, would be an “active particle.”

Petitioner’s overly-broad “enhancing properties” construction should be discarded by the Board as untimely. It should also be rejected as inconsistent with Petitioner’s previously proposed construction, and on that basis, given no weight. To the extent Petitioner asserts it is not inconsistent with its originally-proposed construction (Petitioner appears to contend they are the same), Petitioner’s construction should be rejected as inconsistent with the BRI standard as overly broad and unsupported by the intrinsic record. There is no support in the Patent for the proposition that “active particles” as claimed encompass any particle so long as it “enhances” undefined “properties” in a membrane.

On the contrary, the Patent makes clear that “active particles” can enhance the properties of a membrane by adsorbing or trapping substances on their surface. Ex. 1001, 4:4-21. The references to “absorption” so heavily relied on by Petitioner are obvious typographical errors which were corrected by a Certificate of Correction. Ex. 2030. Petitioner has not asserted any basis to challenge the veracity of the Certificate of Correction or to support a conclusion that those references were

anything other than typographical errors. Moreover, the “active particles” in claim 27 must “improve the moisture vapor transport of the composition.” There is no embodiment where active particles improve water vapor transport by a method other than surface action. None. Petitioner’s “enhancing properties” construction is so overly broad that it improperly encompasses not just absorbent particles, but unreactive, inert particles that would have no effect on water vapor transport. Petitioner’s proposed construction basically equates “active” particles with “inactive” or inert particles, which is contrary to the entirety of the intrinsic record. Petitioner’s claim construction is without basis and is likely driven by Petitioner’s desire to read “active particles” on the “inert” or “inactive” particles in Dutta. Reply at 1-4.

The fact that “active particles” in the Patent may also have other properties such as infra-red absorption or anti-static properties does not mean, as argued by Petitioner on page 2 of the Reply, that active particles must therefore move water vapor across a membrane by absorption. The logic does not work. Active particles in the Patent transport water vapor across a membrane by surface action. There is not a single embodiment in the Patent that transports water vapor across a membrane by the bulk process of absorption. The fact that silica gel, titanium oxide, or other substances can be processed like carbon to be surface-active particles that can move

water vapor across a membrane by adsorption does not expand the scope of the claims to include the un-activated species of those particles.

Every embodiment in the Patent, and in the Haggquist Application which is incorporated by reference, involves active particles moving water vapor by surface-action or adsorption. To be clear, there is not a single embodiment in the Patent where active particles move water vapor through a layer, membrane, or composition by absorption. The inventor, Dr. Haggquist, was very familiar with absorption (Ex. 2011, ¶¶ 9-13), but he did not write the Patent or the claims to cover moving water vapor across a membrane by an absorptive process. Instead, every embodiment of the Patent moves water vapor by adsorption. Cocona's two experts also agree. Ex. 2005, ¶¶ 33-35; Ex. 2006, ¶¶ 55-56. Petitioner's original and new claim constructions are not only unreasonably broad, but they have no basis in the intrinsic record. The broadest reasonable interpretation of "active particles" is "particles that adsorb or trap substances on their surface." All of Petitioner's unpatentability arguments in the Petition are premised on an incorrect claim construction for "active particles" and, on that basis, all Challenged Claims should be confirmed as patentable.

B. "First Thickness" and "Second Thickness"

Petitioner's proposed claim constructions for "first thickness" and "second thickness" hinge on the premise that the Patent does not disclose a two-layer waterproof composition with the first layer being cured (*e.g.*, in a solid state) and the

second layer including the active particles on top of the first layer. That premise is incorrect, and on that basis alone the Challenged Claims should be held patentable. The Patent discloses numerous embodiments that comprise a two-layer composition as recited in claim 27. Ex. 1001, Abstract, 2:12-15, 2:42-46, Fig.1 steps 130, 140; Ex. 1004, ¶¶ 67-68, 71-72, 78.

Petitioner cites to the Abstract in support of its one-layer-only reading of the Patent. Reply at 5. The Abstract does indeed disclose one embodiment where “active particles are incorporated in the membrane.” Abstract. But the Abstract also discloses that “The membrane may be applied to a substrate, or may be used independent of a substrate.” *Id.* The Patent discloses a two-layer waterproof composition.

Moving beyond the Abstract, the specification contains numerous embodiments disclosing a two-layer composition. Ex. 1001, 2:12-15, 2:42-46, Fig.1 steps 130, 140. Petitioner ignores these embodiments, particularly those disclosed in the Haggquist Application, which are incorporated by reference into the Patent. Petitioner’s expert simply waives off the disclosure of the Haggquist Application in an effort to avoid the numerous two-layer embodiments it discloses. Ex. 1044 at ¶ 28 (“While I appreciate that Haggquist was incorporated by reference into the ’287 patent, I do not see the relevance of these excerpts to the specifically claimed invention here.”).

Petitioner also erroneously argues that Cocona's claim construction for "first thickness" is improper because it excludes preferred embodiments. Reply at 5-6. The argument is not entirely clear. As best as Cocona understands it, Petitioner argues on page 5 that the "base material" recited in claim 27 must include active particles because Figure 1 discloses mixing active particles with the "base solution." Reply at 5. Underlying Petitioner's argument is the false and unsupported notion that the patentee acted as his own lexicographer and defined "base material" such that it must include active particles. Petitioner does not apply the relevant law or point to any alleged definitional statement or disclaimer so limiting the term, and neither the Patent nor the claims have any such requirement.

Petitioner's argument is also based on other errors. Petitioner argues that the "substrate" of Figure 1 cannot be the "cured base material" of claim 27 because the patentee didn't explicitly "state[] that this 'substrate' arises from a base material solution..." Reply at 6. This is an impermissible new argument, violates canons of claim construction, ignores the teachings of the Patent, and is the opposite of what Petitioner previously said.

First, there is no *in haec verba* requirement. Second, neither the Patent nor the claim language have an "arising from" requirement, and it would be improper to import such a limitation in the claims. Third, Petitioner turns the concept of ordinary meaning on its head and demands a precise definitional statement in the Patent

equating “substrate” with “base material” in an effort to avoid what Figure 1 obviously teaches—a two-layer composition.

As described in connection with Figure 1, the “substrate” is the solid material—or base—to which the active-particle mixture is applied. Ex. 1001 at Abstract (“The membrane may be applied to a substrate, or may be used independent of a substrate.”) (Emphasis added); 2:13-15 (“The membrane can be a self-supporting membrane or a coating on a substrate.”) (Emphasis added); 2:43-46 (“The membrane may be applied to a substrate such as a woven, non-woven, ePTFE (treated or untreated) substrate, PTFE substrate, polyurethane substrate, or knit material”) (emphasis added). The Patent discloses that the “substrate” and the “base material solution” can be made out of exactly the same material, such as polyurethane. *Id.*, 2:43-46 (the substrate can be made of ePTFE, PTFE, or polyurethane); 3:40-42 (“For example, the base material solution may include a polyurethane solution, a polyacrylic solution, polyurethane solutions...”).

There is no real dispute that the “substrate” described in the Patent is cured or that it contains no active particles. There is also no real dispute that Figure 1 discloses applying an active-particle mixture on a cured substrate as a base. Indeed, Petitioner asserted in the Petition that the “cured base material” of claim 27 is a “non-solution form of a substrate” and that it “encompasses a dried and heated polyurethane solution.”

Claim 27 of the '287 Patent recites a “**cured base material**,” which means a non-solution form of a substrate that was converted from a solution state via any conventional curing technique. (*Id.* at Col. 7:25-33.) This is consistent with how the '287 Patent defines “**cured base material**.” (*Id.* at Col. 3:38-40 & Col. 7:10-33; Ex. 1005 at ¶ 93.) Additionally, a POSITA would understand that the definition of “**cured base material**” encompasses a dried and heated polyurethane solution. (*Id.* at ¶ 114-116.)

Petition at 10 (emphasis in original).

Cocona agrees with Petitioner that the “cured base material” of claim 27 is a “non-solution form of a substrate” and that it “encompasses a dried and heated polyurethane solution.” *Id.* Petitioner’s position directly supports a two-layer interpretation of claim 27 since it acknowledges that the “cured base material” is the “substrate” disclosed in the Patent. With a “cured base material” of “dried and heated polyurethane solution,” as according to the Petitioner, the plurality of active particles must necessarily be deposited on top of the cured base material to form a separate layer or membrane. On this basis, Cocona’s claim constructions are correct and the Challenged Claims are patentable because the Petition did not argue invalidity on the basis of a two-layer interpretation of the claims.

Petitioner attempts to reverse course by offering new testimony that refutes their prior testimony. Ex. 1044, ¶24 (“...the '287 specification never describes or implies that this ‘substrate’ is itself a ‘cured base material’...”). This evidence and

related argument should be disregarded by the Board as new and should be given no weight as inconsistent with prior testimony.

Petitioner's argument for "second thickness" has a number of defects as well, and it is premised on the notions that that patentee acted as his own lexicographer (Reply at 7-8) or disclaimed scope during prosecution (Reply at 8-9). The Petition failed to articulate or apply the appropriate legal tests for these claim construction principles. The primary statement identified by Petitioner was made to show support for a claim amendment, not to disavow claim scope. Ex. 1007 at 17 ("Support for these claim amendments may be found at..."). Moreover, the intrinsic record does not contain a definitional statement or disavowal defining "second thickness" as limited to the particle size of an active particle.

It is beyond reasonable dispute that the Patent discloses and claim 27 recites a two-layer waterproof breathable composition with the first layer or thickness being made of a cured base material (*e.g.*, "a non-solution form of a substrate" including "dried and heated polyurethane solution" according to Petitioner) and a second layer or thickness of active particles on top of the first layer as discussed, for example, in Figure 1. On that basis, Cocona's proposed constructions for "first thickness" and "second thickness" should be adopted and the Challenged Claims should be found patentable.

III. The Asserted References

A. Dutta and Haggquist

Petitioner inappropriately relies on new arguments and new evidence in its Reply with respect to contentions of anticipation in view of Dutta (Ex. 1003) and to contentions of obviousness in view of Dutta over Haggquist (Ex. 1004). Petitioner relies on new evidence in extensively referencing Exhibits 1044, 1049-1050, 1053, 1055. Exhibit 1044 cannot be reasonably characterized as a rebuttal expert declaration, but rather highlights Petitioner's improper attempt to inject untimely, new arguments and evidence into these proceedings. It cannot be disputed that Petitioner failed to present Exhibits 1049-1050, 1053, and 1055 with the Petition. This constitutes a clear violation of the Board's rules in view of *Intelligent Bio-Sys., Inc.*

Petitioner also improperly argues for the first time that Dutta discloses the use of adsorbent particles—this is a completely new position taken by Petitioner that should be excluded. The Petition discusses Dutta under the proposed claim construction of “active particles” as meaning “...particles capable of causing chemical reactions at their surface or capable of physical reactions, including the ability to adsorb, absorb, or trap substances.” Petition at 34. In the Petition,

Petitioner argued that “*Dutta* discloses the use of active particles (absorbent particles) in contact with or layered on a liquid-impermeable breathable cured base material (incorporating the particles into the polymeric film).” *Id.* (emphasis added). Suddenly in the Reply, Petitioner raises the new argument that “...*Dutta*’s hydrophilic particles qualify as particles that “adsorb or trap substances on their surface.” Reply at 11. (emphasis added). This is a new argument improperly raised on Reply in clear violation of this Board’s rules. *See* RTPG 2018, p. 14 (“Petitioner may not submit new evidence or argument in reply that it could have presented earlier, e.g., to make out a prima facie case of unpatentability.”).

Petitioner raises a new, impermissibly broad claim construction that “active particles” encompass anything that provides “enhanced properties.” All arguments relating to *Dutta* are premised on this flawed, legally defective claim construction proposed by Petitioner. Petitioner then presents a slew of new arguments regarding *Dutta* that are based on this faulty claim construction. Being littered with new evidence and argument, the Board should disregard Petitioner’s Reply arguments and evidence regarding *Dutta* in view of the controlling authority of *Intelligent Bio-Sys.* and related jurisprudence.

Beyond the new evidence and new arguments improperly advocated by Petitioner, Petitioner’s arguments on Reply fail to demonstrate unpatentability by a preponderance of the evidence. For example, Petitioner relies on Exhibit 1044 to

purportedly show that its expert previously stated that Dutta disclosed adsorptive active particles. When the statement is actually reviewed, Oelker's statement is false on its face. Oelker contends that "I previously stated that Sephadex also adsorbs or trap[s] substances, and therefore qualifies as an active particles under the Board's construction. (Ex. 1005, ¶ 122 *citing* Ex. 1023, 1286 and Ex. 1027, 7)." Ex. 1044 ¶ 41.

Aside from the improper incorporation by reference of four separate exhibits, Oelker makes no such assertion in her original declaration. In fact, in the very next paragraph of her original declaration, Oelker states, "In 1994, *Dutta* disclosed that Sephadex particles are hydrophilic **absorbent** particles. (Ex. 1002 at p. 4. Ll. 20-28, p. 9. Ll. 15-18 and p. 18. Ll. 10-16)." *Id.*, ¶ 123 (emphasis added). Clearly, Petitioner and its expert place their credibility in jeopardy by making such a stark reversal in their arguments. Dutta discloses super-hydrophilic, absorbent particles, as originally noted by Oelker. Now, Petitioner attempts to take a completely different position by stating exact opposite of what it argued in the Petition. This improper, new argument should be disregarded by the Board under applicable rules; moreover, by contradicting its own Petition with the *same* expert declarant, the Board should afford little weight, if any, to Oelker's testimony on this subject. The Challenged Claims cover adsorbent active particles. Dutta does not disclose such

particles, and only discloses super-hydrophilic absorbent particles. Petitioner's arguments fail on this basis.

Similarly, Dutta does not disclose a "first thickness" and a "second thickness." Petitioner raises the new argument that the Challenged Claims are not limited to a two-layer configuration. First, this argument is improper and was not raised in the Petition. Petition at 33-37. Moreover, Petitioner relies on Example 6 in Dutta, which was not identified or discussed in the Petition. *Id.* Second, Petitioner improperly ignores the plain language of the Challenged Claims as well as two-layer embodiments in the specification. Ex. 1001, 2:12-15, 2:42-46, Fig.1 steps 130, 140; Ex. 1004; ¶¶ 67-68, 71-72, 78.

In a variety of Oelker's further statements, she fails to explain the underlying mechanism of Dutta, why a POSITA would be motivated to combine "active particles" with Dutta, or why there would be a likelihood of success in combining the references. Ex. 1044 ¶¶50-65. She provides no explanation or rationale for how the "active particles" of the Haggquist reference could be substituted with the absorbent particles of Dutta, nor does she provide any articulation of why a POSITA would be motivated to combine the asserted references. *Id.* Where a challenger fails to show a motivation to combine references and a reasonable expectation of success, the Board should find the claims at issue patentable. *See Purdue Pharma L.P. v. Depomed, Inc.*, 643 Fed.Appx. 960, 965-966 (Fed. Cir. 2016) ("As we have

explained, a patent challenger must demonstrate that a skilled artisan would have had reason to combine the teachings of the prior art references to achieve the claimed invention, and that the skilled artisan would have had a reasonable expectation of success from doing so”).

Petitioner can only offer speculation and unsupported, conclusory statements regarding the combination of Dutta and Haggquist references. Petitioner fails to offer any experiments, literature, or any other admissible evidence to show that the super-hydrophilic absorbent particles of Dutta could have been replaced with the adsorbent, active particles of Haggquist. There is nothing to show that even if the substitution was made, that the resulting combination would result in the same MVTR as the Challenged Claims, or even the tables in Dutta. Petitioner does not and cannot know what those ranges would be if the references were combined. Even assuming that the substitution could be made (which it cannot), there is no evidence or discussion of whether the resulting MVTR would fall within the ranges of the Challenged Claims or Dutta.

Here, even in view of new and improper Reply arguments and evidence, Petitioner still fails to sufficiently demonstrate that a POSITA would have had a motivation to combine the Dutta and Haggquist references or that there would have been a reasonable expectation of success. In fact, evidence of record shows just the opposite—Dutta discloses hydrophilic absorbent particles operating under

diametrically opposed scientific principles, as well as inert particles. Ex. 2006 ¶¶82-86. Active particles are simply not disclosed or claimed by Dutta. Moreover, the mechanisms of the absorbent particles of Dutta are not compatible with—nor substitutable with—adsorbent active particles, such as those of Haggquist. *Id.*, ¶¶91-92.

B. Halley and Haggquist

Again, Petitioner inappropriately relies on new arguments and new evidence in its Reply with respect to contentions of anticipation in view of Halley (Ex. 1002) and to contentions of obviousness in view of Halley over Haggquist (Ex. 1004). Petitioner relies on new evidence in extensively referencing Exhibits 1044 and 1051. Exhibit 1044 consists of untimely, new arguments and evidence. Petitioner failed to present Exhibit 1051 with the Petition. This constitutes another clear violation of the Board’s rules in view of *Intelligent Bio-Sys., Inc.*

Petitioner offers new arguments and evidence that the occurrence of improved MVTR makes a particle an “active particle.” This was not presented in the Petition. In the Petition, Petitioner argues that, “*Halley* discloses a plurality of active particles (particulates) have [sic] a second thickness...” Petition at 57. Petitioner confirms this argument in its correlation table included in the Petition. *Id.* at 51 (referring to “particulate solids”). Petitioner took the original position that the existence of particulate solids in Halley constituted “active particles.” It is noteworthy that

Halley lacks any discussion of active particles, surface active particles, or adsorption. Ex. 2006, ¶¶88-90, 98. Petitioner's new arguments and evidence in the Reply do not remedy the deficiency in relying on Halley. Specifically, Petitioner's arguments that particulate solids improve MVTR fail to rise to the level of showing that Halley disclosed "active particles." Pointing to Halley's mechanism only highlights the fact that Halley involves absorbent, hydrophilic particles that swell, which may arguably improve MVTR. Ex. 1003 at 2:2-27; Ex. 2006, ¶99. That fact in isolation fails to demonstrate any reference to "active particles" in Halley. Halley simply does not disclose "active particles."

The remainder of Petitioner's discussion of Halley mirrors that of the Dutta discussion: namely, Petitioner raises a new argument that "first thickness" and "second thickness" do not require separate or distinct layers, and also argues in conclusory fashion that a POSITA would be motivated to combine Halley and Haggquist. Petitioner's new arguments regarding "first thickness" and "second thickness" were not raised in the Petition, and are improper to assert on Reply. Petitioner continues its pattern of insufficient reasoning and evidence by providing conclusory statements regarding motivation to combine and no discussion a reasonable likelihood of success. Likewise, Petitioner fails to offer any experiments, literature, or other admissible evidence to show that even if the combination of Halley and Haggquist were possible, that the resulting MVTR would fall within the

ranges of the Challenged Claims or within the ranges disclosed in Halley. Accordingly, the Board should uphold the patentability of the Challenged Claims.

IV. Secondary Considerations

Petitioner does not contest or even discuss Patent Owner's secondary considerations of commercial success and industry praise. Evidence of industry praise weighs in favor of upholding the patentability of the Challenged Claims. *See Apple Inc. v. Samsung Elec. Co., Ltd.*, 839 F.3d 1034, 1053 (Fed. Cir. 2016). Patent Owner submitted substantial evidence of industry praise directly tied to the Challenged Claims. Ex. 2011, ¶¶24-39; Exs. 2014-2039. This evidence is completely un rebutted by Petitioner. Commercial success via licensing also weighs in favor of upholding the patentability of the Challenged Claims. *See Impax Laboratories Inc. v. Lannett Holdings Inc.*, 893 F.3d 1372, 1381 (Fed. Cir. 2018). Once again, Patent Owner submitted substantial evidence of extensive licensing by third-parties of the Patent and the Challenged Claims. Ex. 2012, ¶¶3-6. In fact, Petitioner itself both praised the technology underpinning the Challenged Claims and became a licensee of the very same technology. Ex. 2011, ¶¶12-17. The nexus between industry praise and the Challenged Claims remains uncontested; likewise, the nexus between commercial success via licensing remains uncontested.

In view of the substantial, uncontested evidence of industry praise and commercial success through licensing, the patentability of the Challenged Claims

should be upheld because the Challenged Claims are not unpatentable over the references and because Petitioner failed to meet its burden of production regarding secondary considerations.

Petitioner purports to challenge secondary considerations of copying, but those arguments are unavailing. Copying of a claimed invention supports a finding of nonobviousness. *See WBIP, LLC v. Kohler Co.*, 829 F.3d 1317, 1336 (Fed. Cir. 2016). Patent Owner established a nexus between Petitioner's products and the Challenged Claims. Ex. 2006, ¶¶ 110-111. Petitioner's product samples were confirmed to meet the thickness ratio and MVTR elements of claim 27. Ex. 2011 ¶¶ 19-20. Petitioner's product samples were then tested and confirmed to meet each of the other limitations of claim 27. Ex. 2006 ¶¶ 112-124. Petitioner errs by challenging Daniels' reliance on Haggquist's knowledge and opinions regarding certain claim limitations. *See Arctic Cat Inc. v. Bombardier Recreational Products, Inc.*, 876 F.3d 1350, 1369-1370 (Fed. Cir. 2017) (expert entitled to base opinions on statements by other experts). This is a common practice and well within the permissible scope of expert opinions pursuant to applicable evidentiary rules. Petitioner's arguments fail in view of applicable case law and the rules of evidence.

Petitioner mischaracterizes its new Exhibit 1052 and errs by asserting neither Cocona nor its licensees practice the claims of the Patent. This is simply inaccurate. Ex. 2012, ¶¶ 3-6. First, the response to Interrogatory No. 14 correctly states that

Cocona has not sold or offered for sale any product that is covered by the Patent. It is Cocona's licensees—not Cocona—that sells or offers for sale products covered by the Patent. Second, the response to Interrogatory No. 13 also correctly states that since February 3, 2015, Cocona has not granted licenses to a licensee that makes or sells products that practice the Patent. Existing licenses, such as those discussed herein, pre-date the February 3, 2015. Nowhere does Cocona “admit” that its licensees don't practice the Patent. Petitioner's argument lacks merit and should be disregarded.

Petitioner also falls short in contesting the product sample testing methods employed by Daniels. Petitioner offers criticisms of the testing methodology used through Oelker, but she does so in a conclusory fashion without factual basis or sufficient reasoning. Such conclusory expert opinions lacking a supporting factual basis should be stricken or excluded, or alternatively, afforded little weight or credibility in these proceedings. *See Power Integrations, Inc. v. Fairchild Semiconductor Intern., Inc.*, 711 F.3d 1348, 1373-1374 (Fed. Cir. 2013). Oelker simply provides no foundation or explanation for what she believes appropriate testing should accomplish; she can only muster contrarian conclusions without factual support. It is undisputed that Petitioner had access to and a full understanding of Patent Owner's technology covered by the Challenged Claims through a prior license of that technology. Ex. 2011, ¶¶15-17. Shortly after terminating its license,

Petitioner launched copycat products. *Id.*, ¶¶21-22. In view of the compelling evidence of copying and the nexus between the copycat products and the Challenged Claims, the patentability of the Challenged Claims should be upheld.

Further, Petitioner appears to take issue with Daniels' discussion of Exhibit 1026. Even assuming those criticisms have merit (which they do not), the Challenged Claims are still patentable. Putting aside Petitioner's challenge to Dr. Daniel's analysis, the Infringement Contentions submitted by Petitioner provide compelling evidence of copying and are unchallenged. Petitioner introduced Exhibit 1026 with the Petition, and those Infringement Contentions establish that Petitioner's accused products practice Challenged Claims. Petitioner does not dispute the substantive analysis in the Infringement Contentions, which maps Challenged Claims to Petitioner's accused products. Petitioner does not dispute that the accused products are, in fact, Petitioner's products, or that they were made by copying the claimed invention from Cocona. The Infringement Contentions establish a nexus as well as provide compelling evidence of copying.

Any one of the secondary considerations alone (i.e., industry praise, commercial success via licensing, or copying) would support a finding of nonobviousness and a ruling upholding the patentability of the Challenged Claims. Taken together (and in view of the uncontested nature of the secondary considerations), the Board should uphold the patentability of the Challenged Claims.

Dated: January 31, 2019

Respectfully submitted,

By: /Jason S. Jackson/

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Lead Counsel for Patent Owner

CERTIFICATE OF SERVICE

Petitioners hereby certify that the foregoing document was served electronically via email on January 31, 2019, on Petitioner's counsel as follows:

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CERTIFICATION UNDER 37 C.F.R. § 42.24(d)

The undersigned hereby certifies that the word count for the foregoing Patent Owner Sur-Reply is fewer than the 5,600 words allowed.

Dated: January 31, 2019

By: /Jason S. Jackson/
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